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**Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens
Industry Software GmbH & Co KG**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(NCC)(A)-1219-07 OF 2017
VERNON ONG, HASNAH HASHIM AND HARMINDAR SINGH JJCA
7 JUNE 2018

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Arbitration — Arbitration award — Registration of arbitration award — High Court did not allow registration of appellants' arbitration award as a whole — High Court only allowed dispositive portion of award to be recognised as binding and enforceable — Appellants appealed against High Court's decision

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— Whether 'award' means any part of award or entire award — Whether High Court could refuse to allow registration of arbitration award based on argument of ulterior or collateral purpose — Arbitration Act 2005 s 38

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This was an appeal from the order of the High Court at Kuala Lumpur on the appellants' motion pursuant to s 38 of the Arbitration Act 2005 ('the Act') and O 69 of the Rules of Court 2012 ('the ROC 2012') to register only the dispositive portion of the arbitration award and declined to register the award as a whole. Aggrieved with the decision of the High Court, the appellants filed the present appeal. The appellants sought to register the entire award but the

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respondent challenged the originating summons on the basis that only the dispositive portion of the award was capable of being registered. The respondent asserted that the application to register appeared to be an attempt to utilise the findings of award for some other ulterior or collateral purpose and not for the purpose of enforcement. It was also argued that there was nothing

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to enforce in view of the fact that the declarations sought by the respondent in the arbitration proceedings were dismissed. The High Court held that only the dispositive portion of the award was capable of being recognised as binding and enforceable and refused to allow registration of the award on the ground of confidentiality in arbitration. In arriving to this decision, the High Court had

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also relied on procedures that were applicable to the Reciprocal Enforcement of Judgments Act 1958 by way of analogical comparison, ie that a 'judgment' included a foreign arbitration award. The issues to be determined on this appeal were whether: (a) an 'award' mean any part of an award ascertained by the court, or must it be an entire award; and (b) when registering an award

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under ss 38 and 39 of the Act, the court can select one part of the award and ignore other parts.

Held, allowing the appeal with costs of RM10,000; setting aside the High Court's order and the award to be registered under s 38 of the Act:

- (1) Having complied with the formal requirements in s 38 of the Act, the registration of an international arbitration award was granted as of right to an applicant unless the respondent could show any reason under s 38 of the Act or under any of the specified grounds specified in s 39 to refuse registration and enforcement (see paras 21). A
- (2) The onus of showing why any such arbitral award ought not to be recognised or enforced shifted to the party opposing such registration or enforcement. None of the grounds in s 39 of the Act to refuse registration of the award, whether as a whole or in part, was raised by the respondent at the High Court. The High Court could not refuse to register the award as a judgment of the court. The sole argument of the respondent that the registration was an attempt to utilise the findings of the arbitration award was for some ulterior or collateral purpose and not for the purpose of enforcing the award, was clearly not recognised as a ground for challenge under s 39 of the Act. The argument of an ulterior motive overlooked the other purposes of the award. Further, because it was within the contemplation of the parties that the findings of the arbitration would be disclosed for the civil suit trial, the ground of confidentiality to oppose registration could not be sustained (see paras 23–25 & 37). B
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- (3) The court is of the view that the award may be relevant and necessary for any subsequent follow up claim by the appellants against the respondent either independently or consequent upon the award. The High Court had no jurisdiction to declare the refusal to register the award on the ground of confidentiality and had misdirected itself in law. It was plainly wrong in refusing to register the award on the ground of confidentiality (see paras 26–27). E
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- (4) It was a fair argument that the purpose of the registration of an award is to enable the award to be enforced or challenged. If only the dispositive part of the award is registered, the court that is tasked with enforcement will be deprived of the advantage of understanding the arbitrator or tribunal's reasoning. The court was of the view that nothing in s 38 or anywhere else in the Act allows for only part of the award to be registered, except for s 38(c) which only applies where the decision is separable (see paras 37–38). G
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- (5) The Reciprocal Enforcement of Judgments Act 1958 only applies to foreign judgments and not arbitration awards. It applies to awards which have become enforceable in a foreign country as a judgment if the court. It would have been more appropriate to rely on the provisions of the Arbitration Act 2005 which was not only recent legislation but specifically created to govern all matters relating to arbitration in Malaysia (see paras 40–41). I

A [Bahasa Malaysia summary]

- Ini adalah rayuan daripada perintah Mahkamah Tinggi di Kuala Lumpur atas usul perayu menurut s 38 Akta Timbang Tara 2005 ('Akta') dan A 69 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk mendaftar hanya bahagian dispositif daripada award timbang tara dan menolak untuk mendaftarkan award secara keseluruhannya. Terkilan dengan keputusan Mahkamah Tinggi, perayu memfailkan rayuan ini. Perayu berusaha untuk mendaftarkan keseluruhan award itu tetapi responden mencabar saman semula atas dasar hanya bahagian dispositif yang layak untuk didaftarkan.
- B** Responden menegaskan bahawa permohonan untuk mendaftar muncul sebagai usaha untuk menggunakan penemuan award untuk tujuan yang berlainan atau cagaran dan bukan untuk tujuan penguatkuasaan. Ia juga berpendapat bahawa tiada apa yang dikuatkuasakan memandangkan hakikat bahawa pengisytiharan yang diminta oleh responden dalam prosiding timbang tara telah ditolak. Mahkamah Tinggi berpendapat bahawa hanya bahagian dispositif award itu boleh diiktiraf sebagai terikat dan boleh dikuatkuasakan dan enggan membenarkan pendaftaran award atas alasan kerahsiaan dalam timbang tara. Dalam membuat keputusan ini, Mahkamah Tinggi juga telah bergantung kepada prosedur yang terpakai bagi Akta Penguatkuasaan
- C** Penghakiman Bersaling 1958 dengan cara perbandingan analogi, iaitu 'penghakiman' termasuk award timbang tara luar. Isu-isu yang perlu ditentukan atas rayuan ini adalah sama ada: (a) suatu 'award' bermakna mana-mana bahagian daripada suatu award yang ditentukan oleh mahkamah, atau mestilah suatu keseluruhan award; dan (b) semasa mendaftar award di
- D** bawah ss 38 dan 39 Akta, mahkamah boleh memilih satu bahagian daripada award itu dan mengabaikan bahagian-bahagian lain.

G Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000; mengetepikan perintah Mahkamah Tinggi dan award yang akan didaftarkan di bawah s 38 Akta:

- (1) Setelah mematuhi kehendak formal dalam s 38 Akta, pendaftaran suatu award timbang tara luar telah diberikan kepada pemohon melainkan jika responden boleh menunjukkan apa-apa sebab di bawah s 38 Akta atau di bawah mana-mana alasan yang ditentukan yang dinyatakan dalam s 39 untuk menolak pendaftaran dan penguatkuasaan (lihat perenggan 21).
- H** (2) Tanggungjawab menunjukkan mengapa mana-mana award timbang tara itu tidak sepatutnya tidak diiktiraf atau dikuatkuasakan beralih kepada pihak yang menentang pendaftaran atau penguatkuasaan itu. Tidak ada alasan dalam s 39 Akta untuk menolak pendaftaran award, sama ada secara keseluruhan atau sebahagian, telah dibangkitkan oleh responden di Mahkamah Tinggi. Mahkamah Tinggi tidak dapat menolak untuk mendaftar award sebagai penghakiman mahkamah. Hujahan tunggal responden bahawa pendaftaran adalah percubaan untuk menggunakan
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- penemuan award timbang tara itu untuk tujuan tertentu dan bukan untuk tujuan penguatkuasaan award, jelas tidak diakui sebagai alasan untuk tentangan di bawah s 39 Akta. Hujahan motif tersembunyi menjatuhkan tujuan lain award itu. Selanjutnya, oleh kerana ia adalah dalam pertimbangan pihak-pihak bahawa penemuan timbang tara itu akan didedahkan untuk perbicaraan saman sivil, alasan kerahsiaan untuk menentang pendaftaran tidak dapat dikekalkan (lihat perenggan 23–25 & 37).
- (3) Mahkamah berpendapat bahawa award itu mungkin relevan dan perlu bagi apa-apa tuntutan susulan berikutnya oleh perayu terhadap responden sama ada secara bebas atau berbangkit daripada award itu. Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mengisytiharkan keengganan untuk mendaftarkan penghargaan itu atas alasan kerahsiaan dan telah tersalah arah dalam undang-undang. Adalah jelas salah kerana enggan mendaftarkan anugerah berdasarkan kerahsiaan (lihat perenggan 26–27).
- (4) Adalah hujahan yang adil bahawa tujuan pendaftaran award adalah untuk membolehkan penguatkuasaan itu dikuatkuasakan atau dicabar. Jika hanya bahagian dispositif yang telah didaftarkan, mahkamah yang ditugaskan dengan penguatkuasaan akan kehilangan kelebihan memahami penimbangtara atau alasan tribunal. Mahkamah berpendapat bahawa tiada apa-apa dalam s 38 atau di mana-mana di dalam Akta membenarkan hanya sebahagian daripada award yang didaftarkan, kecuali s 38(c) yang hanya terpakai di mana keputusan itu boleh dipisahkan (lihat perenggan 37–38).
- (5) Akta Penguatkuasaan Penghakiman Bersaling 1958 hanya terpakai kepada penghakiman luar dan bukan penghargaan timbang tara. Ia terpakai untuk award yang boleh dikuatkuasakan di negara luar sebagai penghakiman mahkamah. Adalah lebih tepat untuk bergantung kepada peruntukan Akta Timbang Tara 2005 yang bukan hanya undang-undang baru-baru tetapi khusus dibuat untuk mentadbir semua perkara yang berkaitan dengan timbang tara di Malaysia (lihat perenggan 40–41).]

Cases referred to

- Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314, CA (refd)
- Brake v Patley Wood Farm LLP* [2014] EWHC 4192, Ch D (refd)
- China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
- Christopher Martin Boyd v Deb Brata Das Gupta* [2014] MLJU 1817; [2014] 9 CLJ 887, FC (refd)
- Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd & Ors and other*

- A *appeals* [2015] 1 MLJ 507, CA (refd)
Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Ltd and another [2016] EWHC 1301, QBD (refd)
Eu Boon Yeap & Ors v Ewe Kean Hoe [2008] 2 MLJ 868; [2007] 6 CLJ 791, CA (refd)
- B *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] All ER (D) 169 (Jul); [2014] EWHC 2374, QBD (refd)
Ngo Chew Hong Oils v Karya Rumpun Sdn Bhd [2009] MLJU 1335; [2009] 1 LNS 1321, HC (refd)
- C *Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685, HC (refd)

Legislation referred to

- Arbitration Act 1996 [UK]
- D Arbitration Act 2005 ss 2, 33(3), 36, 36(1), 38, 38(1), (2), (3), 39, 39(1)
ICC International Court of Arbitration Rules 1998 article 25(2)
Reciprocal Enforcement of Judgments Act 1958 ss 2, 3, 4
Rules of Court 2012 O 69, O 69 r 8
- E *Gopal Sri Ram (Stanley Isaacs, C Sivasankar, Shara Isaacs and David Yii with him) (Isaacs & Tan) for the appellants.*
Mohd Arief Emran bin Arifn (Nimisha a/p Jaya Gobi with him) (Wong & Partners) for the respondent.
- F *GK Ganesan (Shalini Ragunath, Goh An Nee and CC Lam with him) (GK Ganesan) for the intervener.*

Harmandar Singh JCA:

- G [1] This is an appeal from the order of the High Court at Kuala Lumpur dated 26 May 2017. The High Court had made an order on the appellants' motion pursuant to s 38 of the Arbitration Act 2005 ('the AA 2005') and O 69 of the Rules of Court 2012 ('the ROC 2012') to register only the dispositive portion of the arbitration award dated 8 May 2015 ('the award') and declined
- H to register the award as a whole.
- I [2] Aggrieved with the decision not to register the award as a whole, the appellants filed this appeal. The appeal was heard on 8 March 2018. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow.

THE BACKGROUND

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[3] The background facts are well set out in the judgment of the learned judicial commissioner ('JC') and in the submissions of the parties. The first and fourth appellants are companies incorporated in Malaysia. The second and third appellants are Malaysian citizens and directors of the first and the fourth appellants. The respondent is a company incorporated under the laws of Germany with a last known business address in Germany. It does not have any business presence in Malaysia.

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[4] Pursuant to a settlement agreement dated 31 July 2008 ('the settlement agreement'), the appellants and the respondent agreed to amicably resolve certain legal proceedings and to allow for a full and final settlement of all matters in issue between them. Any disputes in relation to the same were to be submitted for resolution through arbitration. The following arbitration clause was found in the settlement agreement:

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This Agreement shall be governed by and construed in accordance with Malaysia law. All disputes at all material time arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the said Rules. Language of the proceedings shall be English. The seat of the arbitration shall be Singapore.

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[5] Sometime in 2009, the appellants commenced an action against the respondent and five others via Suit No S-22-129 of 2009 in the High Court of Kuala Lumpur ('Suit 2009'). In the said suit, the appellants claimed that the settlement agreement was entered into by reason of fraudulent misrepresentation by the respondent and/or its representatives.

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[6] Before the suit could be proceeded with, the respondent obtained an order from this court on 26 April 2011 to stay the proceedings in Suit 2009 in favour of arbitration on account of the arbitration agreement. The appellants' motion for leave to appeal against the decision of this court was dismissed by the Federal Court.

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[7] Thereafter, the respondent initiated arbitration proceedings against the appellants in Singapore pursuant to the arbitration agreement clause where it sought for the following reliefs:

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- (a) declaration as to the validity and finality of the settlement agreement entered into between the respondent and the appellants, and in the event of an opposite finding, the return to the respondent of the sum of EUR3m plus interest calculated from 8 August 2008;

- A** (b) declaration that the present tribunal has sole jurisdiction to adjudicate on all disputes arising out of or in connection with the settlement agreement, and grant any reliefs, including reliefs sought by the appellants in Suit 2009;
- B** (c) declaration as to the final and conclusive nature of the waiver of any claims of the respondent under the settlement agreement, and their inability to assert any future claims including the ones asserted under Suit 2009;
- C** (d) determination as to the absence of valid cause available to the appellants in initiating proceedings under Suit 2009, and a further declaration seeking the appellants to withdraw Suit 2009;
- (e) declaration to the effect that the appellants jointly and severally bear the costs and expenses of:
- D** (i) this arbitration; and
(ii) the Suit 2009, and respective appeals of the respondent plus interest; and
- E** (f) dismissal of the appellants' counterclaim.

[8] The appellants had filed a counterclaim for damages in fraud against the respondent in the arbitration proceedings. However the tribunal made a finding that the said counterclaim was withdrawn due to the appellants' failure to provide the required advances on costs.

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- G** [9] The arbitration was conducted before the arbitration tribunal from 24–30 May 2014 in Singapore. The panel of arbitration consisted of Mr Philip Jeyaratnam SC, the Hon Mr Chan Sek Keong, former Chief Justice of Singapore and Mr Alan J Thambiyah. On 8 May 2015, the arbitration tribunal delivered its final award. In the final award, the arbitration tribunal concluded that it has jurisdiction to hear and determine the respondents' claims and made the following findings:

H N. Summary of findings

185. Summing up, the Tribunal concludes that it has jurisdiction to hear and determine the Claimant's claims, and that:

- I** a. The Settlement Agreement was procured by fraudulent misrepresentation;
- b. The Respondents did not affirm the Settlement Agreement;
- c. The Respondents, in instituting the 2009 Malaysian Suit, breached the arbitration agreement, but the matter has already been dealt with by the Malaysian Courts and so there is no arbitrable issue for this Tribunal.

186. Accordingly, the Claimant [Respondent] is not entitled to any of the declarations or relief sought by it. A

[10] At paras 189–192 of the final award, the tribunal made the following disposition: B

P. Disposition

189. In the premises, the Tribunal concludes and holds that the Claimant's [Respondent] claim be dismissed in its entirety.

190. The Tribunal awards to the Majority Respondents [Appellants] and to the 3rd Respondent their costs of this arbitration, to be taxed pursuant to section 21 of the International Arbitration Act, if not agreed. C

191. The Tribunal also orders that the fees and expenses of the ICC and the Arbitral Tribunal be borne by the Claimant [Respondent] D

192. All other claims and relief sought are hereby rejected.

[11] The appellants then applied to have their costs taxed and on 15 April 2016, the Registrar of the Singapore International Arbitration Centre ('SIAC') issued the taxation certificate. The respondent in turn applied to the High Court of Singapore to set aside the final award. On 4 July 2016, the High Court of Singapore dismissed the respondent's application with costs. There was no appeal filed by the respondent. E

PROCEEDINGS IN THE HIGH COURT F

[12] On December 2016, the appellants filed the instant originating summons to register the final award based on the findings made by the arbitration tribunal. The application was made under s 38 of the AA 2005 and O 69 r 8 of the ROC 2012 seeking the following orders: G

- (a) the final award dated 8 May 2015 from the ICC International Court of Arbitration by the arbitrators Mr Phillip Jeyaretnam SC, Mr Chan Sek Keong and Mr Alan J Thambiayah in the matter of ICC Arbitration 17795/CYK under the rules of ICC between Siemen Industry Software GmbH & Co KG (formerly known as Innotec GmbH) ('the claimant') and Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) ALCIM Holding Sdn Bhd (formerly known as Alcim Technology Sdn Bhd), Toralf Mueller, Jacob s/o George, Thomas George and PEC Konsult Sdn Bhd ('the respondents') be recognised as binding and be enforced by entry of judgment against the respondent herein; H I

- (b) cost of this application; and

- A (c) such further and/or other reliefs as deemed fit and proper by this honourable court.

B [13] By this application, the appellants sought to register the entire award (together with the findings made by the arbitral tribunal). The respondent challenged this originating summons on the basis that only the dispositive portion of the award was capable of being registered as a judgment of the High Court of Malaya. The reason for doing so is not difficult to discern. The award contained damning findings of the tribunal. One such finding, as was alluded to earlier, was that the settlement agreement, upon which the arbitration was founded, was procured by fraudulent misrepresentation by the respondent.

C [14] The respondent, however, asserted that the application to register appeared to be an attempt to utilise the findings of the said arbitration award for some other ulterior or collateral purpose and not for the purpose of enforcing the said award. It was also argued that there was nothing to enforce in view of the fact that the declarations sought by the respondent in the arbitration proceedings were dismissed.

D [15] The learned JC, in granting the application, agreed with the respondent in that only the dispositive portion of the award was capable of being recognised as binding and enforceable as a judgment of the High Court. The learned JC construed the term ‘award’ in s 2 of the AA 2005 by finding that it only refers to the ‘dispositive part’ of an award and not the whole award. Her findings in this context appear at paras 80 and 82 of the grounds of judgment:

E [80] In this respect I am in agreement with the Respondent’s argument that if the intention to register the findings as part of the decision of an arbitrator/ arbitration tribunal, the definition of award in s 2 of the AA ought to be ‘a decision of the arbitral tribunal and the substance of the dispute ...’ rather than the present definition ‘a decision of the arbitral tribunal on the substance of the dispute’ ...

F [82] Under the circumstances there is no justification to construe the term ‘award’ as including the final award as to do so would go against the very intention of ss 38 and 39 of the AA, namely to provide recognition and enforcement to the disposition of the final award.

G [16] In support of her decision, the learned JC relied on the Reciprocal Enforcement of Judgments Act 1958 (Act 99) (‘the REJA’) in the following fashion:

H [103] Thus Act 99 is concerned with the registration of the operative part of the judgment which refers to the decision of the relevant court for the payment of a certain sum of money, for the purpose of enforcement. The Act is not concerned with the finding or reasoning made by the superior court in arriving at such decision ...

[17] The learned JC also refused to allow the registration of the award on the ground of confidentiality in arbitration. As the learned JC put it:

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[99] ... the duty of parties to an arbitration proceedings to maintain the confidentiality of the arbitration proceedings, in particular the arbitration award and the reasons thereto is indeed a compelling ground for this court to decide against the Applicants' OS.

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THE INSTANT APPEAL

[18] Essentially, the same arguments were canvassed before us. This time, however, the intervener had come on board and raised arguments in support the position of the appellants and against the decision of the High Court. The issue raised in this appeal was fairly straight forward. It concerned the law relating to the registration of arbitration awards. In particular, the issue concerned the meaning of 'award' in AA 2005. Does 'award' mean any part of an award as ascertained by the court, or must it mean the entire award? So, in other words, can the court in registering an award under ss 38–39 of the AA 2005 select one part of the award, be it the dispositive part, and ignore the other parts of the award.

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[19] The starting point in trying to resolve the issues as raised above must be a consideration of ss 38–39 of the AA 2005. Section 38(1)–(2) read:

38(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgement in terms of the award or by action.

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(2) *In an application under subsection (1) the applicant shall produce —*

- (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) the original arbitration agreement or a duly certified copy of the agreement.

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[20] It would appear from a plain reading of s 38 that the only requirement for registration was for an applicant to produce a duly authenticated original award or duly certified copy as well as the original arbitration agreement or a duly certified copy, with a translation where it is otherwise than in the national language or the English language (s 38(3) of the AA 2005). It was not disputed that the appellant here had complied with the formal requirements set out in s 38.

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[21] Having complied with the formal requirements in s 38, we agree that the registration of an international arbitration award is granted as of right to an

- A** applicant unless the respondent can show any reason under s 38 of the AA 2005, or under any of the specified grounds provided in s 39 of the same Act, to refuse registration and enforcement.
- B** [22] Coming now as we must to s 39 of the AA 2005, this is a specific provision dealing with the grounds for refusal of a registration application in s 38. Section 39(1) reads:
- C** 39(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is involved —
- D** (a) where that party provides to the High Court proof that —
- E** (i) a party to the arbitration agreement was under any incapacity;
- F** (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
- G** (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- H** (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- I** (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;
- (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
- (vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the High Court finds that —
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- (ii) the award is in conflict with the public policy of Malaysia.
- [23] The extensive nature of the list of grounds must mean that it was intended to be exhaustive in that refusal of recognition or enforcement of an arbitral award can only be allowed on the grounds stated in s 39 of the AA 2005. It is also plain given the express words in s 39 of the Act that the onus of showing why any such arbitral award ought not to be recognised or enforced

shifts to the party opposing such registration or enforcement (see also *Ngo Chew Hong Oils v Karya Rumpun Sdn Bhd* [2009] MLJU 1335; [2009] 1 LNS 1321; *Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685).

[24] In the instant appeal, it would appear that none of the grounds in s 39 of the AA 2005 to refuse registration of the award, whether as a whole or in part, was raised by the respondent at the High Court. It must follow, as a consequence, that the learned JC could not refuse to register the award as a judgment of the court. As alluded to earlier, the respondent's sole argument to refuse registration of the award was that the registration was an attempt to utilise the findings of the said arbitration award for some ulterior or collateral purpose and not for the purpose of enforcing the award. This argument is clearly not recognised as a ground for challenge under s 39 of the AA 2005.

[25] This argument of an ulterior motive, in our view, also overlooks the other purposes of the award as set out in s 36(1) of the AA 2005. Section 36(1) of the AA 2005 provides a broad basis to use an award that is registered under s 38 of the AA in that it can be relied upon in any proceedings in any court. The section reads:

36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set off or otherwise in any proceedings in any court.

[26] This provision also puts paid to the proposition that if that if there is nothing in the award to enforce, the award cannot be registered. Considering the purpose for which the award can be used, this proposition, with respect, is misconceived in law. We take the view that the award may be relevant and even necessary for any subsequent or follow up claim by the appellants here against the respondent either independently or consequent upon the award. The words 'or otherwise in any proceedings in any court' is couched in such wide terms that it would include the kind of matters we have just alluded to.

[27] We would also add that the same reasons would also apply for the refusal to register the award on the ground of confidentiality. At the risk of repetition, this is not a ground for refusal provided in s 39 of the AA. It is unfortunate that the learned JC found the ground of confidentiality to be a compelling argument against registration. With respect, the learned JC had no jurisdiction to declare so and had therefore misdirected herself in law. In our view, and with respect, the learned JC was plainly wrong in refusing to register the award on this ground.

[28] In any event, we found it rather curious that the respondent would rely

A on the ground of confidentiality to deny registration. It was no secret that the appellants and the intervener intended to rely on the arbitration award in the Suit 2009. An application for stay of proceedings was sought in that suit on the basis that the issues, nature and characteristics of the claim in the arbitration proceedings and the court proceedings in the said civil suit were similar and
B overlap. As such, the findings of fact made by the arbitral tribunal would be relevant to the said civil suit.

C [29] Although it is trite law that a term imposing an obligation of confidentiality was to be implied into arbitration agreements as a matter of law, there were exceptions permitting disclosure, for example, where there was consent by the parties or where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party or in the interests of justice (*Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1
D WLR 314).

E [30] In the dispute between them, both parties had seemingly taken the position in the said civil suit that it would be desirable to stay the court proceedings although in the end, for reasons which appear in the reported judgment, this court was compelled to make such an order (see *Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd & Ors and other appeals* [2015] 1 MLJ 507). It was therefore within the contemplation of the parties that the findings of the arbitration would be disclosed for use at the trial of the said civil suit. For these reasons as well, the ground of confidentiality to oppose
F registration cannot be sustained.

G [31] Even with that being the case, we are constrained to observe that in the High Court, learned counsel for the respondent indicated to the court that the respondent had no objection to the registration of the award provided that only the dispositive part of the award was registered. The appellants, of course, objected claiming that the concession would be wholly outside the ambit and purview of s 38 read with s 39 of the AA.

H [32] This brings us then to what we consider to be the crux of this whole appeal which is whether the entire award is capable of being registered to be recognised and enforced or whether it ought to be only the dispositive portions of the same. To recall, s 38(1) of the AA 2005, as set out earlier, states that an award shall be recognised as binding and be enforced by entry as a judgment in
I terms of the award or by action. Under s 2 of the AA 2005, 'award' is defined as:

a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders.

[33] The appellants contended that a decision on the substance of the dispute includes the findings on the same and would therefore be a necessary portion of the award to be registered. In other words, the award must disclose the substance of the dispute. The respondent submitted, and which submission found favour with the learned JC, that a decision on the substance of the dispute must mean the final dispositive portion only.

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[34] In this context, it is pertinent to observe that article 25(2) of the ICC International Court of Arbitration Rules 1998, on which this arbitration was bound by, provides: 'The Award shall state the reasons upon which it is based'. This requirement is also found in our s 33(3) of the AA 2005. Our attention was also drawn to *Russel on Arbitration* (23rd Ed) at p 6-028 where it is stated:

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A reasoned award is one in which the tribunal sets out the reasons for its decision and these reasons form part of the award itself.

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[35] The importance of making a reasoned award available to all parties is also explained in the *Handbook on International Commercial Arbitration* (1st Ed, 2009) by Peter Ashford at p 262:

As ever, it must be borne in mind that the Award has three main purposes. First, to tell the parties what they must do. Second, to explain why the decision has been made, and third, that of consideration by an enforcing body or a Court of Appeal, this demands, not formality, but sufficient information to enable the award to stand on its own.

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[36] In *Christopher Martin Boyd v Deb Brata Das Gupta* [2014] MLJU 1817; [2014] 9 CLJ 887, the Federal Court observed (at p 897 (CLJ)) that the enforcement of arbitration awards must be viewed in two parts. First is the registration of the arbitration award itself as a judgment of the court and secondly the enforcement or execution of such a judgment. Reverting to the instant appeal, it is therefore a fair argument that the purpose of the registration of an award is to enable the award to be enforced or challenged. We find merit in the argument that if only the dispositive part of the award is registered, the court tasked with enforcement will be deprived of the advantage of understanding the arbitrator or tribunal's reasoning.

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[37] We are also persuaded that the bifurcation of the award, as suggested by the respondent, was not intended by Parliament as by virtue of s 36 of the AA 2005, the award may be relied upon by any party in any proceeding in any court. If it was the intention for only the dispositive part of the award to be registered, the statute would have provided so in clear terms.

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[38] In our view, there is nothing in s 38 of the AA 2005 or anywhere else in the same Act which allows for only part of the award to be registered except for

A s 38(3) which allows for part of the award to be recognised and enforced where
a decision is made on matters not submitted to arbitration. This applies where
the decision is separable. This lends support to the proposition that if indeed it
was the intention of the legislature to allow for registration of only the
dispositive part, it would have been clearly stated in terms similar to how it was
B provided in s 38(3) for separable decisions.

[39] Now, the learned JC in arriving at her decision, by way of an analogical
comparison, relied on the procedures that are applicable with the Reciprocal
Enforcement of Judgments Act 1958 ('the REJA'). We were also invited by
C learned counsel for the respondent in this appeal to consider drawing an
analogy with s 4 of the REJA which has the effect of registering foreign
judgments as a judgment of the High Court of Malaya for the purpose of
enforcement of the same. It was submitted that under s 2 of the REJA, the
D definition of 'judgment' includes a foreign arbitration award.

[40] After a careful perusal of the provisions of the REJA, we were of the view
that the REJA only applies to foreign judgments and not arbitration awards.
We note that the definition of 'judgment' in s 2 of the REJA includes 'an award
E in proceedings in an arbitration if the award has, pursuant to the law in force in
the place where it was made, become enforceable in the same manner as a
judgment given by a court in that place'. It is our impression, therefore, that
REJA does not deal with arbitration awards as submitted. It applies to awards
which have become enforceable in a foreign country as a judgment of the court,
F usually after registration in accordance with the laws of that foreign country.

[41] We also do not think that ss 3–4 of the REJA, upon which much
reliance was placed by the learned JC, provide any assistance as those provisions
apply only to judgments given in the superior courts of reciprocating countries.
G It would have been more appropriate to rely on the provisions of AA 2005
which is not only recent legislation but specifically created to govern all matters
relating to arbitration in Malaysia.

[42] Much reliance was also placed on English authorities to advance the
proposition that only the material part of the award is to be registered. The
cases cited in support were *Enterprise Insurance Company plc v U-Drive
Solutions (Gibraltar) Ltd and another* [2016] EWHC 1301 ('Enterprise
Insurance'); *Brake v Patley Wood Farm LLP* [2014] EWHC 4192; and *Konkola
Copper Mines v U&M Mining Zambia Ltd* [2014] All ER (D) 169 (Jul);
H [2014] EWHC 2374. However, our assessment of these cases shows no such
proposition. Instead, the courts there were concerned with the issue of whether
there was a final award, so as to provide the court with jurisdiction, as opposed
to an interim or partial award or a procedural order. The courts there were also
interpreting various provisions of the UK Arbitration Act 1996 and we were
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not advised as to whether our own AA 2005 had the same or similar provisions.

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[43] What is pertinent though is that unlike our AA 2005, there is no statutory definition of an award in English arbitration law as was noted in the English cases cited earlier. In the English cases, reference is invariably made to *Russel on Arbitration* where, for example, in the case of *Enterprise Insurance*, the following passage was cited with approval (at para 36):

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In principle an award is the final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference.

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[44] So, whether an award is final or determinative of the claim or part of the claim and not an interim or partial word is not an issue in the instant appeal. Despite the forceful submissions of learned counsel for the respondent, we are not persuaded that the English cases provide the kind of guidance as submitted or, at least, not in the context of the issues confronting us.

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CONCLUSION

[45] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong. As a result, appellate intervention was warranted (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2007] 6 CLJ 791). Accordingly, we allowed the appeal and set aside the order of the High Court with costs of RM10,000 each to the appellants and the intervener subject to payment of allocator. As a necessary consequence of the appeal, we ordered that the award be registered as a judgment under s 38 of the AA 2005. Deposits were ordered to be refunded.

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Appeal allowed with costs of RM10,000 subject to payment of allocator and order of High Court set aside.

Reported by Mohd Kamarul Anwar

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